

ORIGINAL

Supreme Court, U.S.

FILED

DEC 8 1994

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No. 94-6615

RESPONSE REQUESTED

In The

Supreme Court of the United States

October Term, 1994

CARL THOMPSON,  
*Petitioner,*

v.

PATRICK KEOHANE, Warden,  
BRUCE M. BOTELHO, Attorney General,  
State of Alaska,  
*Respondent.*

On Petition for Writ of Certiorari  
To the United States Court of Appeals  
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

In a habeas corpus action brought by a state prisoner, did the Ninth Circuit Court of Appeals err in applying the presumption of correctness to the state court's factual finding that Thompson was not in custody when he was interviewed by the police?

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Statutes

28 U.S.C § 2254(d) provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Alaska Statute 11.41.100(a)(1)(A) provides:

MURDER IN THE FIRST DEGREE. (a) A person commits the crime of murder in the first degree if

(1) with intent to cause the death of another person, the person

(A) causes the death of any person[.]



Alaska Statute 11.56.610(a)(1) provides:

TAMPERING WITH PHYSICAL EVIDENCE. (a) A person commits the crime of tampering with physical evidence if the person

(1) destroys, mutilates, alters, suppresses, conceals, or removes physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation[.]

## STATEMENT OF THE CASE

### A. Introduction

Carl Thompson was convicted of first-degree murder and tampering with physical evidence in the superior court of the State of Alaska. After the Alaska appellate courts affirmed his convictions, Thompson petitioned for a writ of habeas corpus in the federal district court, claiming that his pre-arrest statement to the police was taken in violation of Miranda v. Arizona and should have been suppressed. The Ninth Circuit Court of Appeals applied the presumption of correctness to the Alaska court's factual finding that Thompson was not in custody during the first police interview. Because the state court's finding that Thompson was not in custody was not clearly erroneous, the Ninth Circuit concluded that Thompson's Miranda rights were not violated during the interview.

Thompson seeks review of the Ninth Circuit's ruling on the admissibility of his statement. More specifically, he seeks review of the conclusion that the determination whether a person is in custody for Miranda purposes is a factual determination subject to the presumption of correctness in 28 U.S.C. § 2254(d).

### B. Factual Background

On September 10, 1986, two moose hunters found the body of a dead woman floating in gravel pit lake off the Elliott Highway near Fairbanks, Alaska. The body was clothed only in a T-shirt and had a heart-shaped tatoo with the name "Carl" over the left breast;

an autopsy revealed that the woman had been severely beaten and stabbed twenty-nine times. The body had been wrapped in a bedspread and a tent fly and weighted down with chains before being thrown into the water.

On September 11, the Alaska State Troopers issued a press release asking the public for assistance in identifying the dead woman and directing the public's attention to the unique tatoo on the body. Later that same day, Carl Thompson telephoned the troopers and reported that his former wife, Dixie Thompson, fit the description of the body. Thompson told the troopers that he had taken his former wife to the airport in early August and that he had not seen her again since that time. Thompson expressed concern for his former wife's well-being and asked the troopers to call him back as soon as more information became available.

Thompson called the troopers again on September 12, inquiring about any developments in the investigation. Thompson was told in this conversation that the body found in the lake had been positively identified as that of his former wife. Thompson talked freely about his relationship with his former wife and expressed his desire to cooperate in the investigation. Thompson also stated that he was familiar with the area around the gravel pit where the body was found, and that he and his former wife had gone there a few times in the past.

On September 15, 1986, at approximately, 10:15 a.m., Investigator Stockard telephoned Thompson and asked him to come to the state troopers' office to identify various items of personal

property belonging Dixie Thompson. These items and the apparent murder weapon had been turned over to the troopers by a woman who had found them in a dumpster. By this time, the troopers had focused the investigation on Thompson as the most likely person to have killed Dixie Thompson. It was undisputed that Investigator Stockard's primary reason for contacting Thompson was to question him about the murder, but Stockard did not tell this to Thompson.

Thompson drove himself to the troopers' office, arriving there at approximately 11:00 a.m. Thompson was questioned by Investigator Stockard and another trooper for approximately two hours. Investigator Stockard did not advise Thompson of his Miranda rights before or during the interview because he did not intend to arrest Thompson at that time and did not consider him to be in custody. During the interview, both troopers wore civilian clothes and had no visible weapons. Thompson was seated next to the door of the interview room with no one blocking his exit, and he was not restrained in any manner. During the questioning, Investigator Stockard repeatedly assured Thompson that he was not under arrest and that he was free to leave at any time.

Thompson initially told the troopers that he knew nothing about his former wife's death. Indeed, the first eighty-three pages of Thompson's statement (approximately the first one hour and fifteen minutes of the interview) consisted mainly of Thompson repeating his story about taking Dixie to the airport and denying any knowledge of the events surrounding her death.



When confronted directly with the evidence known to the troopers, Thompson abandoned his initial story and admitted killing his former wife, but claimed that he had acted in self-defense. Thompson told the troopers that he and Dixie had argued and gone to bed after returning home from a friend's house. Upon awakening the next morning, the argument continued and intensified. According to Thompson, Dixie reached for a gun that was on a file cabinet in the kitchen. Thompson stated that he thought Dixie was going to shoot him, so he grabbed a knife and stabbed her. Thompson stated that Dixie fell down and that he stabbed her again because she kept screaming and he didn't want to see her suffer.

At the conclusion of the interview, Thompson was told that he was free to go, but that his truck would have to be impounded in connection with investigation. Thompson was given the options of calling a cab, having a friend pick him up, or receiving a ride from the troopers; Thompson accepted the offer of a ride and one of the troopers drove him home. Thompson was arrested approximately two hours later and charged with first-degree murder.

While Investigator Stockard was questioning Thompson at trooper headquarters, other troopers were executing a search warrant at Thompson's residence. Thompson was informed during the interview that his residence was being searched pursuant to the search warrant. Scientific testing conducted during the search of the residence revealed a large concentration of blood in the kitchen area where Thompson stated the stabbing occurred; the tires of Thompson's truck were of similar size and tread design to the

tire impressions found near the gravel pit where Dixie Thompson's body had been discovered.

#### C. State Court Proceedings

Thompson was indicted for murder in the first degree, AS 11.41.100(a)(1)(A), and tampering with physical evidence, AS 11.56.610(a)(1). Prior to trial, Thompson moved to suppress his September 15 statement on two grounds. First, he alleged that he was in custody for Miranda purposes during the interview at trooper headquarters and that Investigator Stockard failed to inform him of his Miranda rights. Second, Thompson alleged that his statement was not voluntary because it was the result of psychological coercion and promises of leniency. After an evidentiary hearing, the trial judge ruled that Investigator Stockard was not required to administer Miranda warnings prior to the September 15 interview because Thompson was not in custody. The trial judge also found that Thompson's statement was voluntary. Based on these findings, the trial court denied Thompson's motion to suppress.

The case was tried to a jury. During the trial, the state played the portion of Thompson's statement in which he admitted killing his former wife. The jury found Thompson guilty of both charged offenses, murder in the first degree and tampering with physical evidence.

Thompson appealed his conviction to the Alaska court of appeals. That court affirmed the trial court's factual finding that Thompson was not in custody during the interview at trooper headquarters:



In arguing that [the trial judge] erred in finding that the police were not required to give Thompson Miranda warnings, Thompson does not really argue that he was in custody when the interview occurred. He concedes that "[he] may or may not have been in a custodial setting at the time he was interrogated." Instead, Thompson argues that the police intentionally interrogated him in such a way as to circumvent the requirements of Miranda. He contends that the police went out of their way to set up circumstances where Trooper Stockard's questioning of Thompson would not be custodial so that Trooper Stockard would not have to give Thompson Miranda warnings.

In his written decision finding against Thompson on this issue, [the trial judge] appears to have found that the police intentionally arranged to interrogate Thompson in a non-custodial manner to increase the likelihood that they would get a statement from him. [The trial judge] described this as a "devious police tactic." However, [the trial judge] concluded that the proper test was whether a reasonable person would believe that he was free to leave. [The trial judge] concluded that Thompson, as a reasonable person, would have felt free to break off the interrogation and leave.

It seems clear that [the trial judge] applied the correct test under Hunter v. State, 590 P.2d 888 (Alaska 1979) (adopting objective reasonable person test for determining whether a suspect was in custody for Miranda purposes)]. As we have pointed out earlier, Thompson does not really contend that he was in custody at the time he was questioned by Trooper Stockard. Thompson, responding to Trooper Stockard's request, went to the trooper headquarters on his own. Trooper Stockard assured Thompson numerous times that he was free to leave, that he was not under arrest, and that after the questioning finished, Thompson was free to go. And, in fact, Thompson was allowed to leave after the interrogation ended.

Thompson v. State, 768 P.2d 127, 130-31 (Alaska App. 1989). The

appellate court also affirmed the trial court's finding that Thompson's statement was voluntary. Id. at 131-32.

Thompson's request for discretionary review by the Alaska supreme court was denied.

#### D. Federal Court Proceedings

Thompson filed a petition for writ of habeas corpus in the federal district court, claiming, inter alia, that his Miranda rights had been violated. The district court denied the petition, concluding that the record fairly supported the state court's factual finding that Thompson was not in custody during the interview at trooper headquarters.

Thompson appealed to the Ninth Circuit. That court, relying on its decision in Krantz v. Briggs, 983 F.2d 961 (9th Cir. 1993), held that "a state court's determination that a defendant was not in custody for purposes of Miranda is a question of fact entitled to the presumption of correctness under 28 U.S.C. § 2254 (d)." [App. 1-2 (citations omitted)] The Ninth Circuit went on to conclude that the state court's determination that Thompson was not in custody for Miranda purposes had "fair support" in the record. [App. 2] The Ninth Circuit also concluded that Thompson's confession was voluntary. [App. 2-3]

Thompson now asks this Court to review the Ninth Circuit's holding that custody is a factual determination subject to the presumption of correctness accorded state court factual findings under 28 U.S.C. § 2254(d). He does not seek review of the holding that his confession was voluntary.



## REASONS FOR DENYING THE WRIT

### I. THE CONFLICT IN THE CIRCUITS REGARDING THE DEGREE OF DEFERENCE ACCORDED TRIAL COURT DETERMINATIONS OF CUSTODY NEED NOT BE RESOLVED AT THIS TIME

The Ninth Circuit Court of Appeals in Krantz v. Briggs, 983 F.2d 961, 963-64 (9th Cir. 1993), held that the determination of whether a person is in custody for Miranda purposes is a factual determination subject to the presumption of correctness accorded state court factual findings under 28 U.S.C. § 2254(d). This holding is consistent with the methodology applied by this Court in Miller v. Fenton, 474 U.S. 104 (1985), for determining whether an issue is one of fact or law in the habeas context.

In Miller, this Court discussed the difficulty in distinguishing questions of fact from questions of law. It noted that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." 474 U.S. at 113 (citation omitted). The Court explained that issues that involve the credibility of witnesses and an evaluation of their demeanor are treated as questions of fact and are subject to the presumption of correctness accorded by § 2254(d).

The Ninth Circuit cited Miller v. Fenton when it held that a state court's determination that a person was not in custody for Miranda purposes was a factual one. Krantz v. Briggs, 983 F.2d at 964. Application of the Miller v. Fenton methodology supports the Ninth Circuit's conclusion. This Court adopted an objective test for determining whether a person is in custody or otherwise deprived of his freedom of action in any significant way. See e.g.

Stansbury v. California, 511 U.S. \_\_\_, 114 S.Ct. 1526 (1994); Berkemer v. McCarty, 468 U.S. 420, 442 (1984). A state court trial judge examines the circumstances surrounding the interview and decides whether a reasonable person would have believed that he was free to leave. Resolution of the custody issue involves a determination of what actually occurred, when and where it occurred, what words were spoken and in what context, and what tone of voice was used. These determinations depend in large part on the credibility and demeanor of the witnesses who testify before the state trial court judge regarding the circumstances of the interview. As such, the trial judge's finding that a reasonable person would have believed he was free to leave involves a finding of fact.

Only two circuits other than the Ninth Circuit have examined the issue in the habeas context. The Sixth Circuit in Cobb v. Perini, 832 F.2d 342, 346 (6th Cir. 1987), cert. denied, 486 U.S. 1024 (1988) concluded:

Whether a person is in custody is a question of law to be determined by the court before deciding whether to admit testimony before a defendant was given his Miranda warnings. See Fed.R.Evid. 104(a) ("Preliminary questions concerning ... the admissibility of evidence shall be determined by the court.")

The Sixth Circuit's conclusion was not based on a comparison of which determinations have been treated as factual and which determinations have been treated as mixed questions of fact and law. Rather, the court simply referred to a general evidence rule stating that preliminary questions regarding the admissibility



of evidence are determined by the court. This analysis is faulty because the court determines a myriad of questions which are factual in nature and which are subject to the presumption of correctness. Examples of factual determinations made by trial courts include: a defendant's competency to stand trial, Magio v. Fulford, 462 U.S. 111, 117-118 (1983) (per curiam); whether a defendant entering a guilty plea received adequate notice of and understood the charges, Marshall v. Lonberger, 459 U.S. 422, 431-437 (1983); the impartiality of a particular juror, Patton v. Yount, 467 U.S. 1025, 1038-1039 (1984); the decision to dismiss a potential juror for cause, Wainwright v. Witt, 469 U.S. 412, 429 (1985); and the effect of an ex parte communication on a juror's impartiality, Rushen v. Spain, 464 U.S. 114, 120 (1983) (per curiam).

The Eleventh Circuit has conflicting decisions. In Jacobs v. Singletary, 952 F.2d 1282, 1291 (11th Cir. 1992), the court held that the issue was a mixed question of fact and law. In Purvis v. Dugger, 932 F.2d 1413, 1418-19 (11th Cir. 1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1485 (1992) the court applied the presumption of correctness to the state court finding that the petitioner was not in custody. Neither of the decisions applied the analysis of Miller v. Fenton to the issue. Each simply cited a prior decision reciting general propositions regarding standards of review.

Thompson appears to rely on a split in the circuits regarding the standard of review applied on direct appeal to the

issue of Miranda custody. Most circuits, with little or no analysis, have applied the clearly erroneous standard of review to district court findings regarding custody. See e.g. United States v. Lanni, 951 F.2d 440, 441 & 443 (1st Cir. 1991); United States v. Mitchell, 966 F.2d 92, 98 (2nd Cir. 1992); United States v. Levy, 955 F.2d 1098, 1103 (7th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 102 (1992); United States v. Griffith, 922 F.2d 1343, 1347-48 (8th Cir. 1990); United States v. Robertson, 19 F.3d 1318, 1320-21 (10th Cir. 1994).

The only circuit which has held that the issue is a mixed question of fact and law is the Third Circuit: United States v. Calisto, 838 F.2d 711, 718 (3rd Cir. 1988). The continuing validity of this decision is in doubt. The court relied on the Ninth Circuit's first decision in United States v. Poole, 794 F.2d 462 (9th Cir. 1986). But the Ninth Circuit amended Poole and held that the issue was one of fact. United States v. Poole, 806 F.2d 853 (9th Cir. 1986). It is not clear what the Third Circuit will do if asked to reconsider Calisto in light of the latter Poole decision. It might be persuaded to follow the Ninth Circuit.

Thompson did not raise the issue on direct appeal; he raised it in the context of a habeas case. Only three circuit courts of appeals have addressed the issue in the habeas context, and one of those circuits has conflicting decisions. It is not clear how most of the circuits will apply the Miller v. Fenton analysis and decide the issue when the issue is squarely presented in a habeas case filed by a state prisoner. Moreover, it is not



clear how the circuits will resolve the issue if it is squarely presented on direct appeal. The issue needs more development in the circuits. Therefore, this Court should deny Thompson's petition.<sup>1</sup>

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<sup>1</sup> This Court recently denied a petition for writ of certiorari in Tagala v. Prewitt, \_\_\_ U.S. \_\_\_, 115 S.Ct. 355 (1994), on the identical issue.

II. THE QUESTION DOES NOT WARRANT DISCRETIONARY REVIEW BY THIS COURT BECAUSE THOMPSON WILL NOT BE ENTITLED TO A NEW TRIAL EVEN IF HE PREVAILS

This Court in Brecht v. Abrahamson, 507 U.S. \_\_\_, 113 S.Ct. 1710 (1993), adopted the harmless error standard set forth in Kotteakos v. United States, 328 U.S. 750 (1946), for habeas cases. Under Kotteakos, a trial error requires a new trial only if it "had substantial and injurious effect or influence in determining the jury's verdict." 328 U.S. at 776.

Application of that standard leads to the conclusion that the admission of Thompson's statement to Investigator Stockard was harmless. The state's theory of the case was that Thompson murdered his former wife because he thought she might go to the police with information about his suspected drug dealing activities. Thompson did not testify at his trial. Thompson defended on the ground that he initially stabbed his former wife in self-defense; he claimed that he then lost control and killed his former wife in the heat of passion.

But Thompson's brother-in-law testified that Thompson said he kept Dixie around to keep her mouth shut, and that if he could "off the bitch" and get away with it, he would do it. Another witness related a conversation with Thompson that occurred before Dixie's body was found in which Thompson stated it was easy to kill someone and get rid of the body because he had done it.

Based on the evidence at trial which showed that Thompson had severely beaten and stabbed his former wife twenty-nine times and then attempted to get rid of her body, the testimony of these

witnesses regarding Thompson's statements about the murder were much more damaging than anything Thompson said in his statement to the troopers. The evidence against Thompson was overwhelming. Any error in admitting Thompson's statement did not have a substantial and injurious effect or influence on the verdict.

CONCLUSION

Thompson's petition for writ of certiorari should be denied.

Respectfully submitted this 8th day of December, 1994.

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